Petition

Office-Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

81-2067
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF HAWAII,
Petitioner,
vs.
FLOYD BLOSS,
Respondent.

STATE OF HAWAII,
Petitioner,
vs.
TRACEY L. HAWKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

CHARLES F. MARSLAND, JR.
Prosecuting Attorney
ARTHUR E. ROSS
Deputy Prosecuting Attorney
City and County of Honolulu
1164 Bishop Street
Honolulu, Hawaii 96813
JOHN CAMPBELL, JR.
Special Deputy Prosecuting Attorney
COUNSEL OF RECORD
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the City and County of Honolulu can prohibit the distribution of commercial handbills in selected public areas consistent with the First Amendment?

LIST OF PARTIES AFFECTED

State of Hawaii
City and County of Honolulu
Respondent Floyd Bloss
Respondent Tracey L. Hawkins
Andre B. Barbose[1]
Ricardo Silva[2]
Joseph A. Moylan[3]
City and County of Maui[4]

---

[1]*State* v. *Barbose*, Criminal No. 54829, which involves the same city ordinance, has been appealed by the State to the Supreme Court of Hawaii.

[2]*State* v. *Silva*, Criminal No. 54898. This case also involves the same city ordinance and is on appeal to the Supreme Court of Hawaii.

[3]*State* v. *Moylan*, Criminal No. 54901, also involves the same city ordinance and is pending before the Supreme Court of Hawaii.

[4]City and County of Maui has a similar ordinance, Chapter 5.12 of the *Maui County Code*, which has been held invalid based on the decision of the Hawaii Supreme Court in *State* v. *Bloss*.

TABLE OF CONTENTS

Question presented for review i

List of parties affected i

Opinions below 1

Jurisdiction 1

Constitutional provisions involved 1

Ordinance involved 2

Statement of the cases 4

Reasons for granting the writ 6

I

The Hawaii Supreme Court erroneously interpreted and applied the different tests enunciated by this court to determine the validity of regulations governing commercial speech 7

II

The Hawaii Supreme Court erroneously found the instant ordinance vague in violation of the Due Process Clause of the Fourteenth Amendment 9

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases

Bigelow v. Virginia, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975) 8, 9

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) 10

Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) 6, 7, 8, 9

Consolidated Edison v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) 7

Metromedia Inc. v. San Diego, U.S. , 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981) 8, 9

Valentine v. Chrestensen, 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942) 8, 9

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976) 11

Constitution

United States Constitution
First Amendment 1, 9
Fourteenth Amendment 2, 9

Hawaii Constitution
Article I, Section 4 2
Article I, Section 5 2

Ordinance

Revised Ordinance of Honolulu
Section 26-6.2 ..... 2-3, 4, 5, 6, 9

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF HAWAII,
Petitioner,
vs.
FLOYD BLOSS,
Respondent.

STATE OF HAWAII,
Petitioner,
vs.
TRACY L. HAWKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, State of Hawaii, respectfully prays that a writ of certiorari be issued to review the decisions of the Supreme Court of the State of Hawaii in *State* v. *Bloss* and *State* v. *Hawkins*, which involve an interpretation of the same city ordinance, were decided approximately at the same time, and are consolidated for purposes of this petition.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii in *State* v. *Bloss* is reported at 637 P.2d 1117. The opinion is printed as Appendix A. The Supreme Court of Hawaii amended its opinion in order to correct erroneous references to the State Constitution which resulted from recent renumbering of its provisions. The amendment appears herewith as Appendix B.

The opinion of the Supreme Court of Hawaii in *State v. Hawkins* is printed as Appendix C.

JURISDICTION

The *State* v. *Bloss* opinion was filed December 17, 1981. A petition for rehearing was denied on January 29, 1982. The final judgment on appeal was entered on March 10, 1982. Appendix D.

The *State v. Hawkins* opinion was filed on April 20, 1982. The final judgment on appeal was entered on April 30, 1982. Appendix E.

This Honorable Court has jurisdiction to adjudicate the case under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment I

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Constitution.

Article 1:

Section 4. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances. [Ren and am Const Con 1978 and election Nov 7, 1978]

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. [Ren and am Const con 1978 and election Nov 7, 1978]

ORDINANCE INVOLVED

City Ordinance:

Sec. 26-6.2. Regulations Affecting Peddlers.

(a) It shall be unlawful for any person, whether exempt or licensed under Section 26-6.1, to sell or offer for sale goods, wares, merchandise, foodstuffs, refresh-

ments or other kinds of property or services upon the streets, alleys, sidewalks, parks, beaches and other public places, unless such person is also duly licensed under the provisions of Section 237-9, HRS, to engage in and conduct such business as required by said Section 237-9, HRS.

(b) Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale, solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly, goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services, or to distribute commercial handbills, or to carry on or conduct any commercial promotional scheme, advertising program or similar activity in the following areas:

(1) On the Pali Highway from the intersection of Nuuanu Pali Drive to Castle Junction including the Pali Lookout (improved observation area at the summit) and access road thereto.

(2) Makapuu Lookout (parking area overlooking Makapuu Beach) on Kalanianaole Highway.

(3) On Diamond Head Road from Poni Moi Road to Kulamanu Place.

(4) Tantalus Drive from Aaliamanu Place to Ualakaa Park.

(5) Waimea Bay—beginning at Maunawai to the Kupupolo Heiau on Kamehameha Highway.

(6) Within 100 feet of the easterly end of Naupaka Street on Laie Point.

(7) Waikiki Peninsula—upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki commencing at the entrance to the Ala Wai Canal, thence along the Ala Wai Canal

to Kapahulu Avenue, thence along the Diamond Head property line of Kapahulu Avenue to the ocean, thence along the ocean back to the entrance of the Ala Wai Canal.

(8) Fort Street and Union Malls—the length and width of those areas in downtown Honolulu designated as the Fort Street Mall and the Union Street Mall.

The provisions of this subsection shall not apply to the sale or offer for sale of daily newspapers of general circulation and to duly authorized concessions in public areas. (Am. Ord. 3609, 4302)

STATEMENT OF THE CASES
STATE v. BLOSS

Respondent Bloss was arrested in Waikiki on February 1, 1979 for violation of Section 26-6.2(b) (7), *Revised Ordinance of Honolulu* (hereinafter "R.O.H."). Respondent was cited for displaying "Gun Club of Hawaii" flyers on the side of a Volkswagon bus, license no. 6E-7356. The Volkswagon bus had pockets affixed to its outer body. The "Gun Club of Hawaii" flyers or handouts were within the pockets, presumably to invite pedestrians to remove the commerical handbills. Appendix A at page A-3.

On February 22, 1979 and March 5, 1979, Respondent Bloss appeared in the District Court and upon Respondent's demand for jury trial, the case was committed to the Circuit Court. On March 30, 1979, the Respondent was arraigned in Circuit Court and an Amended Charge was filed by the Prosecuting Attorney charging Attempted Prohibited Peddling. Appendix A at page A-3.

On April 5, 1979, the Respondent filed a motion to

declare Revised Ordinance Section 26-6.2(b) (7), as amended, unconstitutional on its face. Appendix A at page A-4.

A hearing was held on Respondent's motion on April 19, 1979. On May 10, 1979, Judge Takao filed an order and written decision declaring Revised Ordinance Section 26-6.2(b) (7), as amended by Ordinance 3609 and 4302 unconstitutional on its face. Appendix A at page A-4.

On June 1, 1979, the State filed a motion for reconsideration of the order issued by Judge Takao. This motion for reconsideration was denied on June 15, 1979 by Judge Takao. On June 7, 1979, the State filed its notice of appeal. Appendix A at page A-4.

The Hawaii Supreme Court affirmed the decision of the lower court, holding that Section 26-6.2(b)(7), *R.O.H.*, was unconstitutional as being violative of the guarantee of free speech and being void for vagueness in violation of the due process of law. Appendix A at page A-2.

The ordinance in question regulates peddling on streets, sidewalks and malls, and in other public places. Appendix A at page A-2. The primary justification for banning the distribution of commercial handbills is that this type of activity creates a detrimental nuisance and adversely affects the State's tourist industry.

STATE v. HAWKINS

On the evening of November 12, 1980, at about 9:10 p.m., Respondent Hawkins was seen by the police stopping several pedestrians on Waikiki's sidewalks and giving them handbills which advertised a free breakfast if one attended a time-sharing presentation. Respondent Hawkins was then given a citation for violating the ordinance in question.

After demanding a jury trial, Respondent's case was transferred to circuit court whereupon a motion to dismiss was filed. After considering the memoranda and arguments presented, the circuit court declared Section 26-6.2 (b) (7), *R.O.H.*, unconstitutional and dismissed the charge against appellee. Appendix C at page C1-2.

The Hawaii Supreme Court affirmed the decision of the lower court based on its opinion in *State* v. *Bloss.*

Accordingly, the State of Hawaii is appealing both decisions.

REASONS FOR GRANTING THE WRIT

In its opinions in *State* v. *Bloss,* hereinafter *"Bloss,"* and *State* v. *Hawkins,* hereinafter *"Hawkins,"* the Hawaii Supreme Court erroneously applied the constitutional test of the validity of "pure speech" gleaned from decisional case authority of the United States Supreme Court to what were clearly regulations of "commerical speech" in holding the said regulations invalid.

In *Bloss,* the Hawaii Supreme Court correctly recognized that the subject municipal ordinance affected only commerical speech. Then, after correctly applying the four-part analysis of *Central Hudson Gas* v. *Public Service Commission,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)[1] the Hawaii Supreme Court came to the astonishing

[1]In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commerical speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 566.

conclusion that the ordinance in question was invalid because it failed the three-part "pure speech" analysis of *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

In *Hawkins*, after deciding that the regulation in question affected ony commercial speech interests, the Hawaii Supreme Court found the ordinance to be invalid because it failed the *Consolidated Edison* three-part "pure speech" analysis.

Inasmuch as the United States Supreme Court has clearly delineated the different analysis to be applied to "commerical speech" and "pure speech" regulations, the application of the wrong test to regulations affecting commercial speech alone, is clear error of constitutional magnitude.

I.

THE HAWAII SUPREME COURT ERRONEOUSLY INTERPRETED AND APPLIED THE DIFFERENT TESTS ENUNCIATED BY THIS COURT TO DETERMINE THE VALIDITY OF REGULATIONS GOVERNING COMMERCIAL SPEECH.

In *Bloss*, after reiterating the *Central Hudson Gas* four-part analysis for testing the validity of commercial speech regulations, the Hawaii Supreme Court found that the ordinance in question met all of the *Central Hudson* analysis except part 4 — that the restriction "reaches no further than necessary" to directly advance a substantial government interest. In applying this last test the Hawaii court found:

> . . . By banning all commercial handbilling in Waikiki, the ordinance seeks out speech of a parti-

> cular content and seeks to prevent its dissemination completely . . . the instant ordinance permits non-commerical forms of speech and handbilling while completely banning commercial handbilling in Waikiki . . .

637 P.2d at 1127

> Although preventing nuisances to enhance the attractiveness of tourism is important, on balance, this rationale is not sufficient to justify the total suppression of commercial speech . . .

637 P.2d at 1128.

Astonishingly, the Hawaii Supreme Court found it objectionable that the ordinance was more restrictive of commercial speech than noncommercial speech. Yet this is completely permissible under the standards enunciated in *Central Hudson Gas, supra,* and *Metromedia Inc.* v. *San Diego*_____U.S.____, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981).

The Hawaii Supreme Court erroneously equated the complete ban of commercial handbilling in Waikiki with "total suppression" of commercial speech.

This Court has held for forty years that restricting commercial handbilling in a limited area is constitutionally permissible. *Valentine* v. *Chrestensen,* 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942). The continued vitality of *Valentine, supra,* was confirmed in *Bigelow* v. *Virginia,* 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975):

> But the holding [in *Valentine*] is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed.

421 U.S. at 819.

Based on this Court's clear pronouncements in *Valentine, supra, Bigelow, supra, Central Hudson Gas, supra,* and *Metromedia, supra,* the Hawaii Supreme Court committed clear error in holding Section 26-6.2(b) (7), *R.O.H.*, unconstitutional due to its more restrictive treatment of commercial speech than noncommercial speech, a practice which is clearly constitutionally permissible.

Finally, although the Hawaii court purported to decide *Bloss* on state grounds as well as under the First and Fourteenth Amendments of the *United States Constitution,* the *Bloss* decision is obviously based upon previous decisional authority of the United States Supreme Court. The mere giving of lip service to the authority of the *Hawaii State Constitution* should be no barrier to review by this Court inasmuch as *Bloss* is expressly decided upon the authority of the First and Fourteenth Amendments to the *United States Constitution.*

The Hawaii Supreme Court made no distinction between its decisions in *State* v. *Bloss* and *State* v. *Hawkins.* Accordingly, the arguments here adduced against the *Bloss* decision are equally applicable to *Hawkins.*

II.
THE HAWAII SUPREME COURT ERRONEOUSLY FOUND THE INSTANT ORDINANCE VAGUE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In holding the ordinance at issue to be unconstitutionally void for vagueness, the Hawaii Supreme Court, in *Bloss,* found the term "commercial handbills" to be objectionably vague:

> The ordinance attempts to be all-inclusive in its prohibition of commercial handbilling. However, the

> ordinance lacks the precision with which it defines the categories of 'causes' it covers. *Hynes* v. *Mayor of Oradell, supra,* 425 U.S. at 621, n.5, 96 S.Ct. at 1761 n.5. It is not clear what is meant by the phrase 'commercial handbills.' As we discussed above, some forms of commercial speech are constitutionally protected. The ordinance does not attempt to distinguish between lawful and unlawful conduct. Does 'commercial handbills' include protected and unprotected speech or does it just mean unprotected speech? Thus, given this ambiguity, a person of ordinary intelligance would be unable to determine the parameters of proper and improper conduct. *See, Connally* v. *General Const. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322[,](1926); *Lanzetta* V. *New Jersey, supra; State* v. *Kaneakua, supra.*

637 P.2d at 1129.

This decision and reasoning is clearly erroneous, not in conformity with the decisions of this Court. The controlling authority is *Buckley* v. *Valeo,* 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976):

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' * * * where constitutional requirement of definitions is at stake, we have the further obligation to construe the statute done consistent with the legislature's purpose, to avoid the shoals of vagueness.

424 U.S. at 76—77.

The ordinance at issue clearly meets the simple and straightforward requirement of *Buckley* v. *Valeo, supra.*

Commercial speech has been expressly defined by this Court as any speech proposing no more than a commercial transaction. *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976). The ordinance is question patently restricts "commercial handbills". It is not by any stretch of the imagination void for vagueness.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated at Honolulu, Hawaii: May, 1982.

Respectfully submitted,

CHARLES F. MARSLAND, JR.
Prosecuting Attorney

ARTHUR E. ROSS
Deputy Prosecuting Attorney
City and County of Honolulu
1164 Bishop Street
Honolulu, Hawaii 96813

JOHN CAMPBELL JR.
Special Deputy Prosecuting Attorney
COUNSEL OF RECORD

Attorneys for Petitioner

Appendix

Appendix A

SUPREME COURT OF HAWAII—1

STATE OF HAWAII, Plaintiff-Appellant, *v.*
FLOYD BLOSS, Defendant-Appellee

NO. 7440

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE FRANK TAKAO, JUDGE

CRIMINAL NO. 52666

DECEMBER 17, 1981

RICHARDSON, C.J., OGATA, MENOR,
LUM AND NAKAMURA, JJ.

OPINION OF THE COURT BY OGATA, J.

The State of Hawaii (hereinafter State) appeals an order and a written decision of the First Circuit Court which declared Section 26-6.2(b)(7), Revised Ordinances of Honolulu (hereinafter R.O.H.) as amended,[1] unconstitutional as being violative of the guarantee of free speech, and being void for vagueness in violation of due process of law. For the reasons set forth below, we affirm in part and reverse in part the decision of the circuit court.

Section 26-6.2, R.O.H., regulates peddling on streets, sidewalks and malls, and in other public places. That ordinance as amended by Ordinance 4302 (italicized material), provides in pertinent part:[2]

> (b) Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale, *solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly,* goods, wares, merchandise, food stuffs, refreshments or other kinds of property or services, *or to distribute commercial handbills, or to carry on or conduct any commercial promotional scheme, advertising program or similar activity in the following areas:*
>
> (7) Waikiki peninsula — upon the public streets, alleys, sidewalks, malls, parks, beaches or other public places

---

[1]Section 26-6.2(b), R.O.H., was amended by Ordinance No. 3609 and Ordinance No. 4302.

[2]While appellee only challenged subsection (b)(7) of the ordinance, its restrictions also apply to the Pali Lookout, Makapuu Lookout, Diamond Head Road, Tantalus Drive, Waimea Bay, Laie Point and Fort Street and Union Malls.

in Waikiki commencing at the entrance to the Ala Wai Canal to Kapahulu Avenue, thence along the diamond head property line of Kapahulu Avenue to the ocean, thence along the ocean back to the entrance of the Ala Wai Canal.

The provisions of this subsection shall not apply to the sale or offer for sale of daily newspapers of general circulation and to duly authorized concessions in public places.

Violations of the ordinance could result in imprisonment for not more than one year, fine of not more than $1,000 or both. Section 26-6.3, R.O.H.

On February 1, 1979, defendant-appellee, Floyd Bloss (hereinafter appellee), was arrested for violating Section 26-6.2(b)(7), R.O.H. Specifically, appellee had "Gun Club of Hawaii" handbills in pockets affixed to the outer body of a Volkswagon van which was legally parked in a metered stall on Royal Hawaiian Avenue in Waikiki. These handbills advertised in Japanese, appellee's shooting gallery where customers could shoot live .22 caliber firearms at targets. The handbills were available for passersby to remove and dispose of them accordingly.

On February 22, 1979, and March 5 1979, appellee appeared in the District Court of the First Circuit, and upon his demand for a jury trial, the cause was committed to the First Circuit Court. On March 30, 1979, appellee was arraigned on the amended charge of attempted prohibited peddling.[3].

---

[3]The amended charge read:

On or about the 1st day of February, 1979, in the City and County of Honolulu, State of Hawaii, FLOYD BLOSS did attempt to

Then on April 5, 1979, appellee filed a motion to declare Section 26-6.2(b)(7), R.O.H., unconstitutional on its face. After a hearing on this motion, on May 10, 1979, the First Circuit Court issued an order and a written decision declaring Section 26-6.2(b)(7), R.O.H., unconstitutional on its face as being violative of the First Amendment guarantee of free speech and of due process of law.[4] The trial court found that: appellee could properly challenge the constitutionality of the ordinance; that commercial speech is protected under the First Amendment but can be regulated where other forms of speech could not; that the ordinance was not a constitutionally permissible regulation of commercial speech; and that the ordinance was vague and ambiguous. On May 31, 1979, the State filed a motion for reconsideration which was denied by the circuit court on June 13, 1979.[5] The State now appeals.

---

distribute commercial handbills, upon a public street within the Waikiki peninsula, by parking a Volkswagon van, State of Hawaii License No. 6E-7356, with commercial handbills displayed for distribution on Royal Hawaiian Avenue, an act which constitutes a substantial step in a course of conduct intended to culminate in the commission of the offense of Prohibited Peddling in violation of Section 705-500 of the Hawaii Revised Statutes and Section 26-6.2(b)(7) of the Revised Ordinances of the City and County of Honolulu, 1969, as amended by Ordinances 3609 and 4302.

[4]The free speech guarantee is under the First Amendment to the United States Constitution, and Article I, Section 3 of the Hawaii State Constitution. The protections afforded by the due process clause are under the Fourteenth Amendment to the United States Constitution, and Article I, Section 4 of the Hawaii State Constitution.

[5]This Court will not consider matters outside the record for purposes of appellate review unless the parties comply with H.R.C.P. Rule 75(c). City & County v. Toyama, 61 Haw. 156, 158, 598 P.2d 168, 170-71, n.1 (1979); Pickering v. State, 57 Haw. 405, 409, 557 P.2d 125, 128 (1976);

I.

The State asserts that appellee did not have standing to challenge the constitutional validity of Section 26-6.2(b)(7), R.C.H., relying on cases holding that the overbreadth doctrine[6] is inapplicable to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977); *Ohralik v. Ohio State Bar Ass'n* 436 U.S. 447, 462-63 n.20 (1978). Theses cases reason that the overbreadth doctrine does not apply to commercial speech because such speech is not susceptible to being crushed by overbroad regulation. *Bates v. State Bar of Arizona, supra.*

The trial court found it unnecessary to resort to exceptions to the rules of standing. The trial court based its decision on the specific conduct of appellee under the instant ordinance, not how this ordinance applied to others.

Orso v. City & County, 55 Haw. 37, 38-39, 514 P.2d 859, 860 (1973). Accordingly, we disregard the Corporation Counsel's letter of June 2, 1981, and the attached affidavit of Barbara Mills.

[6]Traditionally, a party does not have standing to challenge an ordinance or statute on the ground that it may be applied unconstitutionally to others not before the court. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Bigelow v. Virginia, 421 U.S. 809 (1975). However, in the First Amendment area, the overbreadth doctrine developed as an exception to the above-stated rule and permits a party whose own rights are not violated to challenge the constitutionality of an ordinance upon a showing that it abridges protected speech of persons not before the court. Bigelow v. Virginia, *supra;* State v. Kaneakua, 61 Haw. 136, 597 P.2d 590 (1979); State v. Manzo, 58 Haw. 440, 573 P.2d 945 D(1977). This exception developed because courts recognized that "the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977).

Where restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented, standing to challenge the constitutionality of an ordinance or statute exists. *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Central Hudson Gas v. Public Service Comm'n,* 447 U.S. 557 (1980). We further note that the touchstone to the question of standing remains "the needs of justice." *Life of the Land v. Land Use Comm'n,* 63 Haw. 166, 623 P.2d 431 (1981).

For example, in *Bigelow v. Virginia, supra,* the trial court rejected Bigelow's assertion that the statute for which he was convicted was overbroad and unconstitutional as applied to him. The United States Supreme Court held that Bigelow, a newspaper editor, had standing to challenge the constitutionality of the Virginia statute which prohibited him from selling or circulating any publication encouraging or promoting abortions. The court stated:

> There must be a "claim of specific present objective harm or a threat of specific future harm." That requirement, however, surely is met under the circumstances of this case, where the threat of prosecution already has blossomed into the reality of a conviction, and where there can be no doubt concerning the appellant's personal stake in the outcome of the controversy. The injury of which appellant complains is one to him as an editor and publisher of a newspaper, he is not seeking to raise the hypothetical rights of others . . . The facts of this case well illustrate "the statute's potential for sweeping and improper application." [Citations omitted.]

421 U.S. at 816-17.

Likewise in *Central Hudson Gas v. Public Service Comm'n, supra,* the Supreme Court permitted Central

Hudson to challenge the constitutionality of restraints placed upon their advertising, which promoted the use of electricity, by the Commission. The court observed: "In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson, and to the extent the limitations are unnecessary to serve the State's interests, they are invalid." *Id.* at 565, n.8.

In the instant case, we find that appellee has standing to challenge the constitutionality of the ordinance. Although the ordinance conceivably affects others, the interests of hypothetical third parties are not involved, thus the over-breadth doctrine is inapplicable. It is appellee's rights which were violated by the prohibitions of the ordinance. Appellee has shown a claim of specific present objective harm and a personal stake in the outcome. Thus justice is served and the trial court properly found that appellee had standing.

II.

The State contends that the trial court erred in declaring the instant ordinance violative of the free speech guarantee of the First Amendment of the United States Constitution, and Article I, Section 3 of the Hawaii State Constitution. However, we first must examine whether the instant form of expression is commercial speech. If found to be commercial speech, we then consider whether such speech is entitled to constitutional protection.

A.

A precise definition of what is commercial speech has not been well developed in the case law. *See,* Comment, "First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine," 44 U. CHi. L.Rev. 205

(1976). Recent cases have attempted to more clearly define the scope and parameters of commercial speech.[7] In *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976), the Supreme Court held that commercial speech includes speech which proposes no more than a commercial transaction. Then, in *Central Hudson Gas v. Public Service Comm'n, supra*, at 561, the court stated that commercial speech is "expression related solely to the economic interests of the speaker and its audience." *See Friedman v. Rogers*, 440 U.S. 1, 11 (1979); *Bates v. State Bar of Arizona, supra*, at 363-64; *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra*, at 762. However, these broad definitions clearly do not encompass all forms of promotional advertising. For as we will discuss *infra*, commercial speech is accorded less constitutional protections and can be regulated where other forms of speech could not. *Young v. American Mini Theater*, 427 U.S. 50 (1976).

---

[7]The Supreme Court has consistently failed to define commercial speech precisely, but the following are examples of protected commercial speech. *See, e.g.*, Central Hudson Gas. v. Public Service Comm'n, 447 U.S. 530 (1980) (inserts on public issues into monthly bills); Linmark Associates Inc. v. Willingboro, 431 U.S. 85 (1977) (posting of "For Sale" & "Sold" signs); Bates v. State Bar of Arizona, *supra* (newspaper advertisement of legal services); Virginia Pharmacy Bd. v. Virginia Consumer Council, *supra* (advertisement of presecription drug prices); Bigelow v. Virginia, *supra* (newspaper advertisement on abortion assistance); Koffler v. Joint Bar Ass'n, 51 N.Y. 2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (direct mail solicitation); People v. Mobil Oil Corp., 48 N.Y.2d 192, 397 N.E.2d 724, 422 N.Y.S.2d 33 (1979) (posting of signs); Welton v. City of Los Angeles, 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 (1978) (vending-sale of street maps).

The cornerstone of what constitutes commercial speech is the dissemination of information. As the Supreme Court noted in *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* at 765:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing what product, for what reason, and at what price.

Therefore, so long as speech, in whatever form of expression, disseminates information of a commercial nature, such is commercial speech. In his concurring opinion in *Central Hudson Gas v. Public Service Comm'n, supra,* Justice Stevens described the kinds of expression considered to be commercial speech:

> A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of the product or service more familiar to the general public.

447 U.S. at 580 (Stevens, J., concurring in judgment). We find this to be a workable starting definition of commercial speech.

The parties in this appeal agree that the material contained in the handbill in question was commercial speech. Although the record does not include the handbill involved, its substance was an advertisement of appellee's shooting gallery. This communication makes the name of a service more familiar to the public. Thus, we find that the

instant handbill constitutes commercial speech.

B.

We now turn to and consider whether commerical speech should be afforded constitutional protection.

Constitutional protection for commercial speech is a recent development of constitutional jurisprudence. Initially, commercial speech was not afforded the protections of the First Amendment. In *Valentine v. Chrestensen,* 316 U.S. 52 (1942), the United States Supreme Court upheld the constitutionality of a municipal ordinance that prohibited the distribution of commercial handbills. However the validity of the *Valentine* doctrine was put into doubt by subsequent court decisions. *See, Bigelow v. Virginia, supra; Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376 (1973).

In *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* the United States Supreme Court held that speech which proposes no more than a commercial translation enjoys the protections of the First Amendment. As the court stated:

> It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money. [Citations omitted.]

425 U.S. at 761. Thus, the Virginia statute which prohibited the advertisement of prescription drug prices was found unconstitutional.

Subsequent decisions of the Supreme Court have attempted to clarify and develop the commercial speech doctrine. In *Bates v. State Bar of Arizona, supra,* the court

held that truthful advertisement concerning the availability and terms of routine legal services was protected by the First Amendment. However, *Ohralik v. Ohio State Bar Association, supra,* held that in-person solicitation was not protected commercial speech under the First Amendment. In *Linmark Associates Inc. v. Willingboro, supra,* the court struck down an ordinance which prohibited the posting of real estate "For Sale" signs. The court found that the ordinance was not a reasonable regulation of a First Amendment right. Then in *Friedman v. Rogers, supra,* the court held that trade names which are a form of commercial speech are not protected by the First Amendment since such speech had no intrinsic meaning concerning price information or the nature of services offered. More recently, in *Central Hudson Gas v. Public Service Comm'n, supra,* the Supreme Court held that a regulation of the New York Public Service commission which completely prohibited an electric utility from advertising to promote the use of electricity violated the First Amendment. Finally, last term, the court in *Metromedia Inc v. San Diego*____U.S.____, 101 S.Ct. 2882 (1981)(plurality op.), held that a San Diego ordinance which prohibited commercial advertising on billboards was a permissible regulation of commercial speech. However, in that same case, the city's ban on signs carrying noncommercial advertising was found to be invalid.

Other jurisdictions have held that commercial speech is protected by the First Amendment. *Welton v. City of Los Angeles,* 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 (1978); *Veterans of Foreign Wars v. City of Steamboat Springs,* 195 Colo. 44, 575, P.2d 835 (1978); *Equifax Services Inc. v. Cohen,* 420 A.2d 189 (Me. 1980);

Comprehensive Accounting Service v. Maryland State Bd., 284 Md. 474, 397 A.2d 1019 (1979); *Berg Agency v. Township of Maplewood*, 163 N.J. Super. 542, 395 A.2d 261 (1978); *Stuckey's Stores Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979); *Koffler v. Joint Bar Ass'n.*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980); *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 397 N.E.2d 527, 422 N.Y.S.2d 33 (1979); *People v. Remeny*, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976); *Adler, Barish, Daniels, Levin, & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978); *H & L Messengers Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979).

The constitutional protections afforded commercial speech are justified unter three different rationales. First, the speaker's interest, although purely economic, is not disqualified from protection of the First Amendment. *Bates v. State Bar of Arizona, supra*, at 364; *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra*, at 762. Second, the consumer is more concerned with the free flow of commercial information because it is useful in determining where scarce dollars are best spent. *Id.* at 763-64. Third, society benefits from the constitutional protection afforded commercial speech because such speech furthers the "societal interest in the 'free flow of commercial information.'" *First Nat'l Bank of Boston v. Bellotti*, 4 U.S. 765, 783 (1978); *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra*. The Supreme Court, emphasizing this strong societal interest, in *Virginia Pharmacy* stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those*

> *decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.* And if it is indispensable to the proper allocation of resources in a free enterprise system, *it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.* Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. [Citations omitted; emphasis ours.]

425 U.S. at 765.

And in *Central Hudson Gas v. Public Service Comm'n, supra,* the court reiterated its rejection of the overly paternalistic view of government to suppress or regulate commercial speech. The court stated:

> [P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Id. at 562.

However, the protections afforded by the First Amendment are not absolute. There are situations where speech may justifiably be suppressed in spite of the First Amendment.[8]

---

[8] *See, e.g.,* Miller v. California, 413 U.S. 15 (1973) (obscenity); Gertz v. Robert Welch Inc., 418 U.S. 323 (1974) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Incitement); Friedman v. Rogers, 440 U.S 1 (1979) (communication more likely to deceive than to inform); Ohralik v. Ohio State Bar Ass'n, *supra* (deceptive communications); Pittsburgh Press Co., v. Human Relations Comm'n, *supra* (commercial speech relating to illegal activity).

Similarly, commercial speech is not absolutely protected by the First Amendment. The protections afforded commercial speech are not commensurate with other speech. In fact, commerical speech is given lesser protection than other forms of expression. *Metromedia Inc. v. San Diego, supra; Central Hudson Gas v. Public Service Comm'n supra,* at 562-63. The court has recognized the common-sense distinction between commercial speech and noncommercial speech, and in *Ohralik v. Ohio State Bar Ass'n, supra,* at 456, the court stated:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [Citations and footnotes omitted.]

Thus, the lesser protection afforded to commercial speech is because such speech is more easily verifiable since the disseminator knows more about the product or service than anyone else. Moreover, there is less likelihood of commercial speech being chilled or muted by regulation since such speech is calculated to generate profits. *Central Hudson Gas v. Public Service Comm'n, supra,* at 564, n.6; *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* at 771-72, n.24; *Friedman v. Rogers, supra,* at 10.

Given that commerical speech is afforded lesser status than other forms of expression, "[s]ome forms of commercial speech regulation are surely permissible." *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* at 770.

The protection afforded to commercial speech depends upon balancing "the nature both of the expression and of the governmental interest served by its regulation." *Metromedia Inc. v. San Diego, supra; Central Hudson Gas v. Public Service Comm'n, supra,* at 562-63; *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* at 766. In determining the validity of government restrictions on commercial speech, a four-part test, developed in *Central Hudson Gas v. Public Service Comm'n, supra,* must be satisfied.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve the interest.

447 U.S. at 566.

Applying this test to the instant case, we find that the ordinance is an invalid regulation of commercial speech.

The record does not reflect nor do the parties contend that the instant handbill was inaccurate, misleading or related to unlawful activity. *See, Friedman v. Rogers, supra; Ohralik v. Ohio State Bar Ass'n, supra; Pittsburgh Press Co. v. Human Relations Comm'n, supra.* Thus, the commercial speech interests in advertising appellee's shooting gallery are protected by the First Amendment.

Now turning to the second part of the Central Hudson Gas test, we examine whether the governmental interests asserted are substantial. The State asserts a number of justifications in support of the ban on commercial hand-

billing.[9] The State's primary justification for banning commercial handbilling is that commercial handbilling and related activity creates a detrimental nuisance in Waikiki, which adversely affects our tourist industry.

Examples of substantial governmental interests include aesthetics and traffic safety, *Metromedia Inc. v. San Diego, supra;* energy conservation and fair rates, *Central Hudson Gas v. Public Service Comm'n supra;* orderly movement and control of large crowds, *Heffron v. Int'l Society for Krishna Consciousness,*____U.S.____, 101 S.Ct. 917 (1981); regulating traffic and securing public safety, *Cox v. New Hampshire,* 312 U.S. 569 (1941); privacy and safety, *May v. Colorado,*____U.S.____, _____P.2d____(50 U.S.L.W. 2210, October 13, 1981). It is beyond dispute that

---

[9]The other justification is support of the instant ordinance is the preventaion of litter which would result from the distribution of commercial handbills. The State contends that the ordinance is in the interst of public health and safety. However, this asserted interest does not justify a total prohibition on the distribution of commercial handbills. In Schneider v. State, 308 U.S. 147 (1939), the U.S. Supreme Court rejected a similar argument asserted to justify the ordinance in that case. The court stated at p. 162:

> [T]he purpose to keep streets clean of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.

the City Council has a substantial interest in preserving and maintaining the attractiveness of tourism, one of our State's major industries.[10]

Positive responses to the first two inquiries under the *Central Hudson Gas* test requires analysis of the third prong which examines whether the regulation directly advances the state interest involved. The supreme court noted that regulations that indirectly advance state interest could not be upheld. *See, Bates v. State Bar of Arizona, supra; Virginia Pharmacy Bd. v. Virginia Consumer Council, supra.* But, in this instance, Section 26-6.2(b)(7), R.O.H., directly advances the state interest involved. There is a direct relationship between the ban on commercial handbilling and the State's interest in preventing detrimental nuisances, especially to tourists.

Finally, we examine whether the govermental interest asserted could be served by a more limited restriction on commercial speech. In other words, is the regulation more extensive than necessary to serve the asserted governmental interest? As the court in *Central Hudson Gas* state:

> . . . the First Amendment mandates that speech restrictions be narrowly drawn. The regulatory technique may extend only as far as the interest is serves. The State

---

[10]Section 26-6.2(b), R.O.H. was amended in 1974 by the City Council after a letter requesting action was submitted by Wesley Hillendahl, President of the Waikiki Improvement Association. In the letter, dated September 21, 1973, Mr. Hillendahl expressed concern over the "rash of solicitors using our public sidewalks and imposing upon passing pedestrians." He noted that this type of activity created a "detrimental nuisance on our public sidewalk." Hillendahl submitted a revision to the instant ordinance with hopes of eliminating this nuisance. After review by various City agencies, Ordinance 4302 was enacted and incorporated all of Mr. Hillendahl's suggestions and additionally prohibited commercial handbilling.

> cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interests as well.[Citations omitted.]

447 U.S. at 565.

When laws infringe on protected commercial speech, albeit a lesser protected liberty, such laws must still be narrowly drawn. Thus, in order to determine whether a regulation is more extensive than necessary to serve the asserted governmental interest, by necessity, such an inquiry includes an examination of whether the ordinance is a reasonable time, place and manner restriction.

Time, place and manner restrictions are permitted provided "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* at 771; *see, Heffron v. Int'l Society for Krishna Consciousness, supra; Schad v. Borough of Mount Emphraim,* ____U.S. ____, 101 S.Ct. 2176 (1981); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980); *Carey v. Brown,* 447 U.S. 455 (1980). The instant ordinance is deficient in several respects.

First, by it terms, the ordinance prohibits commercial speech at all time and in any manner in Waikiki. As such, the ordinance cannot be considered a proper regulation as to time or manner.

Second, a place regulation is valid if the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *Schad v. Borough of Mount Emphraim, supra; Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). The trial court found

that since Waikiki has a high concentration of retail commercial activity, the commercial speech involved here is not incompatible with the activities of this district. There is nothing in this record showing the incompatibility of commercial handbilling with activities in Waikiki. Therefore, we conclude that the ordinance is not permissible place regulation.

In addition, time, place and manner restrictions must be content neutral, and must apply to all forms of speech. *Consolidated Edison v. Public Service Comm'n, supra,* at 536. By banning all commercial handbilling in Waikiki, the ordinance singles out speech of a particular content and seeks to prevent its dissemination completely. Thus, this regulations cannot be considered content neutral. The instant ordinance permits noncommercial forms of speech and handbilling while completely banning commercial handbilling in Waikiki.[11] *Id.* at 537; *Carey v. Brown,* 447 U.S. 455, 462 n.6 (1980); *People v. Remeny,* 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976) (Fuchsberg, J., concurring).

---

[11]An ordinance which totally bans handbilling in public places is unconstitutional. Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). The "streets, sidewalks, parks, and other similar public places are so historically associatedwith the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968).

Additionally, the instant ordinance does not leave open ample alternative channels of communication. The State argues that appellee could advertise by way of newspapers, radio, key rings, ballpoint pens, in tourist publications such as "This Week" or by other promotional means.[12] In *Linmark Associates Inc. v. Willingboro, supra,* the United States Supreme Court addressed a similar argument regarding the prohibition of "For Sale" signs in front of homes. The court's reasoning in rejecting that there are alternative means to indicate a house is for sale is equally applicable here. The court stated at p.93:

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound tracks, demonstrations, or the like. The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more cost and less automony than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory. [Citations omitted.]

These alternative forms of communication asserted by the City are far from satisfactory since they may involve greater expense and may be a less effective means for communicating messages.

---

[12]We note that even advertisements in tourist magazines may be illegal under the ordinance since the ordinance exempts only daily newspapers of general circulation.

Although preventing nuisances to enhance the attractiveness of tourism is important, on balance, this rationale is not sufficient to justify the total suppression of commercial speech, which disseminates information that is neither false, misleading nor related to illegal activity. In addition, the State has made no showing that a more limited regulation cannot adequately protect its asserted interests. *Central Hudson Gas v. Public Service Comm'n, supra,* at 570. Moreover, we do not see how leaving handbills pockets affixed to the outerbody of a motor vehicle, which invites interested passersby to take such handbills, creates a detrimental nuisance or poses a danger to the asserted state interest. None of the dangers associated with in-person solicitation are involved here. Therefore, we hold that Section 26-6.2(b)(7), R.O.H., impermissibly regulates protected commercial speech which violates the First Amendment of the United States Constitution, and Article I, Section 3 of the Hawaii State Constitution.

III.

We have consistently recognized that due process of law requires that a penal statute or ordinance state with reasonable clarity the act it proscribes and must also prescribe fixed standards for adjudging guilt when that person stands accused. *Grayned v. City of Rockford,* 408 U.S. 104 (1971); *State v. Kaneakua,* 61 Haw. 136, 597 P.2d 590 (1979); *State v. Manzo,* 58 Haw. 440, 573 P.2d 945 (1977); *State v. Grahovac,* 52 Haw. 527, 480 P.2d 148 (1971). A penal statute or such a statute or ordinance is void for

vagueness.[13]

The rationale for the requirements of due process are three-fold. *See, Grayned v. City of Rockford, supra; State v. Manzo, supra.* First, a criminal statute must state with reasonable clarity the act it proscribes because under our system of laws, in order for a person to choose between lawful and unlawful conduct, the law must give "persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly." *State v. Kaneakua, supra,* at 138, 597 P.2d at 593. Under due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939).

Second, prescribing fixed standarts for adjudging guilt is necessary to avoid having judges, juries or police officers create their own standards. As this Court stated in *Kaneakua, supra,* at 139, 597 P.2d at 593:

> This court has also recognized that statutes which fail to provide explicit standards are subject to arbitrary application and enforcement. Vague laws impermissibly delegate policy matters to the subjective and *ad hoc* decision making of police officers on the beat, judges, and juries and may result in capricious or discriminatory action. [Citations omitted.]

---

[13]We have held that statutes and ordinances must comply with the two-prong standard enunciated above, otherwise such laws are void for vagueness and violate due process of law. *See, e.g.,* In Re John Doe, 54 Haw. 647, 513 P.2d 1385 (1973)(juvenile loitering curfew); State v. Bloss, 62 Haw. 147, 613 P.2d 354 (1980)(juvenile loitering); State v. Shigematsu, 52 Haw. 604, 483 P.2d 997 (1971)(barricaded place); State v. Grahovac, *supra,* (loitering); State v. Abellano, 50 Haw. 384, 441 P.2d 333 (1968)(presence at cockfight); Territory v. Anduha, 31 Haw. 459, *aff'd* 48 F.2d 171 (9th Cir. 1931)(loitering).

Finally, a vague statute affects basic First Amendment freedoms where the exercise of those freedoms would be inhibited unless the boundaries of forbidden conduct are clearly marked. *State v. Manzo, supra,* at 455, 573 P.2d at 955.

We recognize that vagueness is a relative concept. Thus, when First Amendment rights are not implicated, a lesser degree of specificity in a statute is acceptable. *State v. Manzo, supra.* However, where the First Amendment is implicated, a greater degree of specificity is necessary to avoid inhibiting speech and the free dissemination of information. *Cf. Hynes v. Mayor of Oradell,* 425 U.S. 610, 620 (1976); *Buckley v. Valeo,* 424 U.S. 1, 76-77 (1976). At the court in *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-33 (1963) stated:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanction may deter their exercise almost as potently as the actual application of sanction. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. [Citations and footnote omitted.]

The State asserts that appellee's conduct clearly fell within the prohibition of the ordinance. The ordinance specifically bans distribution of commercial handbills, and as such, the State contends that the ordinance is not vague as applied to the appellee. Although it may appear that the instant ordinance clearly prohibits appellee's conduct, a

more detailed examination reveals the vagueness of the ordinance.[14]

The ordinance attempts to be all-inclusive in its prohibition of commercial handbilling. However, the ordinance lacks the precision with which it defines the categories of "causes" it covers. *Hynes v. Mayor of Oradell, supra,* at 621, n.5.[15] It is not clear what is meant by the phrase "commercial handbills." As we discussed above, some forms of commercial speech are constitutionally protected. The ordinance does not attempt to distinguish between lawful and unlawful conduct. Does "commercial handbills" include protected and unprotected speech, or does it just mean unprotected speech?[16] Thus, given this ambiguity, a person of ordinary intelligence would be unable to determine the parameters of proper and improper

---

[14]The other flaw of this ordinance is its vagueness, not its overbreadth. We note the similarities between the doctrines of vagueness and overbreadth. A statute may be overbroad because its vagueness extends its reach too far, and yet have sufficient specificity to avoid a challenge for facial invalidity. Conversely, a vague statute need not be overbroad. Sufficient specificity in a statute is not an assurance against vagueness. State v. Manzo. *supra.*

[15]Other portions of this ordinance are also unduly vague. The ordinance does not make clear what is meant by the phrase "solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly." Nor does the ordinance explain what is meant by "to carry on or conduct any commercial promotional scheme, advertising program or similar activity." These phrases require a person of common intelligence to guess at the scope of the ordinance. Additionally, these provisions do not provide guidance to law enforcement officials on whether certain conduct is lawful or unlawful.

[16]Speech that is false, deceptive, misleading and relates to illegal activity is not protected. *See,* Note 8, *supra.* Commercial speech that can be regulated as provided in *Central Hudson Gas, supra,* would also be unprotected.

conduct. *See, Connally v. General Const. Co., 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, supra; State v. Kaneakua, supra.*

Moreover, the instant ordinance does not meet the second prong of the due process analysis set forth above. As in *State v. Bloss, supra,* Section 26-6.2(b)(7), R.O.H., fails to provide explicit standards for determining guilt. Thus, law enforcement officials have no guidance in determining whether conduct is lawful or not.

Therefore, we conclude that Section 26-6.2(b)(7), R.O.H., is void for vagueness and violates due process of law.

The State also contends that the ordinance should be construed in accordance with HRS § 1-15. Under that statute, ambiguous words may be given meaning from its context or from the intent of the statute. Thus, the State asserts that the ordinance should be read as a prohibition on the sale and solicitation of products in certain limited areas.

While we are mindful of this rule of construction, we cannot sustain the ordinance for the reasons set forth above. We have recognized that "[t]he judicial power to hold a legislative enactment unconstitutional should be exercised prudently and with restraint. But this does not mean that the legislature can avoid the constitutional mandate to state clearly the acts proscribed . . ." *State v. Abellano,* 50 Haw. 384, 385, 441 P.2d 333, 334 (1968). We are aware of the concerns expressed to the City Council in Mr. Hillendahl's letter, *see,* note 10, *supra,* but that does not relieve the legislative branch of its duty to follow constitutional mandates. It is not the role of the courts to rewrite statutes or ordinances in order to cure constitutional defects. *Id.* at 386, 441 P.2d at 335. That would be an unconstitutional exercise of legislative power.

IV.

By declaring Section 26-6.2(b), R.O.H., unconstitutional, we do not intend to leave a void in the ordinances of the City and County of Honolulu. It is the general rule that where an act purporting to amend and re-enact an exisitng statute is void, the original statute remains in force.[17] *Frost v. Corporation Comm'n,* 278 U.S. 515, 525-27 (1929); *Ross v. Goshi,* 351 F. Supp. 949 (D.Haw. 1972); *Steward v. Waller,* 411 F.Supp. 206 (N.D. Miss. 1975); *see* 82 C.J.S., *Statutes* §§ 270, 247.

---

[17]Ordinance No. 4302 does not have an express savings clause. However, there is a general savings clause in Section 26-9.6, R.O.H. which reads:

> The provisions of this article are hereby declared to be severable. In accordance therewith, if any portion of said article is held invalid for any reason, the validity of any other portion of this article shall not be affected and if the application of any portion of this article to any person, property or circumstance is held invalid, the application hereof to any other person, property or circumstance shall not be affected.

We find this to be additional support that the terms of Ordinance No. 4302 which are constitutionally deficient, can be severed from the valid portions of Section 26-6.2(b), R.O.H. Moreover, the validity of Section 26-6.2(b) is not dependent on the amendment found in Ordinance No. 4302. Each section is separate and independent from one another. Thus, after excising the void portions of Section 26-6.2(b), namely Ordinance No. 4302, we find that the remainder of the law is intelligent, complete and capable of execution. Territory v. Hoy Chong, 21 Haw. 39, 43 (1912).

As our above discussion reveals, Ordinance No. 4302 amended Section 26-6.2(b), R.O.H., in 1974. It is Ordinance No. 4302 which infringed on appellee's rights to free speech and due process of law. Thus, the provisions of Ordinance No. 4302 due to its unconstitutionality, would be void and have no effect to amend a valid prior enactment. Therefore, Section 26-6.2(b), R.O.H., prior to the 1974 amendment is hereby reinstated.[18]

V.

Based on our above discussion, we find that Section 26-6.2(b)(7), R.O.H., is an impermissible regulation of protected commercial speech. The instant ordinance abridges rights protected by the First Amendment of the United States Consitution, and Article I, Section 3 of the Hawaii State Counstitution.

We also find that Section 26-6.2(b)(7), R.O.H., is vague and ambiguous. Thus, the ordinance violates the due process clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 4 of the Hawaii State Constitution.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion.

---

[18]Prior to the 1974 amendment, Section 26-6.2(b), R.O.H., read as follows:

Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services except newspapers of general circulation and by duly authorized concessions in public places, in the following areas: . . .

Appendix B

NO. 7440
IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1981

STATE OF HAWAII, Plaintiff-Appellant, *v.*
FLOYD BLOSS, Defendant-Appellee.

CRIMINAL NO. 52666

ORDER

The opinion of the Court filed on December 17, 1981, is hereby amended to conform to the renumbering of the sections of the Hawaii State Constitution by the 1978 Constitutional Convention:

Wherever the words and figure "Article I, Section 3" appear on pages i, 3, 5, 18 and 23, delete the figure "3" and insert in lieu thereof the figure "4"; and

Wherever the words and figure "Article I, Section 4" appear on pages 3 and 23, delete the figure "4" and insert in lieu thereof the figure "5".

The clerk of the court is directed to incorporate the foregoing changes in the original opinion.

DATED: Honolulu, Hawaii, February 8, 1982.

Appentix C

IN THE SUPREME COURT OF THE STATE OF

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1981

STATE OF HAWAII, Plaintiff-Appellant, *v.*
TRACEY L. HAWKINS, Defendant-Appellee

NO. 8180

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE RICHARD Y. C. AU, JUDGE
CRIMINAL NO. 55032

APRIL 20, 1982

RICHARDSON, C.J. LUM, NAKAMURA, JJ.,
AND RETIRED JUSTICES OGATA AND MENOR
ASSIGNED BY REASON OF VACANCIES

Per Curiam. The State of Hawaii (hereinafter State) appeals from a decision of the First Circuit Court which dismissed its complaint against defendant-appellee, Tracey L. Hawkins (hereinafter appellee), for violating Section 26-6.2(b)(7), Revised Ordinances of Honolulu (R.O.H.). The issues raised herein have been addressed in our recent decision of *State v. Bloss,* 64 Haw. , 637 P.2d 1117 (1981), which we find to be dispositive. Accordingly, we affirm the decision of the circuit court.

On the evening of November 12, 1980, at about 9:10 p.m., appellee was seen by the police stopping several pedestrians on the sidewalk near Lewers Street and giving them handbills which advertised a free breakfast if one attended a time-sharing presentation. Appellee was then given a

citation for violating the ordinance in question today. After demanding a jury trial, appellee's cause was transferred to circuit court whereupon a motion to dismiss was filed. After considering the memoranda and arguments presented, the circuit court declared Section 26-6.2(b)(7), R.O.H., unconstitutional and dismissed the charge against appellee.

As amended by Ordinance No. 4302 (italicized material), Section 26-6.2, R.O.H., regulates peddling on streets, sidewalks and malls, and in other public places. That ordinance provides in pertinent part:

> (b) Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale, *solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly,* goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services, *or to distribute commercial handbills, or to carry on or conduct any commercial promotional scheme, advertising program or similar activity* in the following areas: . . .
>
> (7) Waikiki peninsula — upon the public streets, alleys, sidewalks, malls, parks, beaches or other public places in Waikiki commencing at the entrance to the Ala Wai Canal to Kapahulu Avenue thence along the diamond head property line of Kapahulu Avenue to the ocean, thence along the ocean back to the entrance of the Ala Wai Canal.
>
> *The provisions of the subsection shall not apply to th sale or offer for sale of daily newspapers of general circulation and to duly authorized concessions in public places.*

In *State v. Bloss, supra,* we addressed the issue of whether Section 26-6.2(b)(7), R.O.H., violated the first amendment

and the due process clause of the United States Constitution and the corresponding sections of the Hawaii Constitution.[1] We declared that the portion of Section 26-6.2(b)(7), which was amended by Ordinance No 4302, was unconstitutional. We held that commercial speech is entitled to constitutional protection, albeit a lesser protection than other forms of speech. Thus, governmental regulation of commercial speech is constitutionally permissible when such speech concerns lawful activity and is not deceptive or misleading; that the regulation seeks to implement a substantial governmental interest; that the regulation directly advances that interest; and reaches no further than necessary to accomplish the given objective. Although Section 26-6.2(b)(7) had good intentions of trying to preserve the attractiveness of Waikiki for tourism, we determined that the instant ordinance was more extensive than necessary to serve that asserted governmental interest. The ordinance did not leave open, ample alternative channels of communication. We further found that the instant ordinance was also unduly vague, thus violating the due process clause of the federal and state constitutions.

In the instant case, the State argues that Section 26-6.2(b)(7) is a valid exercise of the State's police power and that the impact of the regulation upon speech is minimal. However, our conclusion in *Bloss* that the instant ordinance is more extensive than necessary to serve the asserted

---

[1]Free speech is guaranteed by the First Amendment to the United States Constitution and Article I, Section 4 of the Hawaii State Constitution. Due process protections are found in the Fourteenth Amendment of the United States Constitution and Article I, Section 5, Hawaii Constitution.

governmental interest of preserving the attractiveness of Waikiki for tourism is equally applicable here. The ordinance in question totally prohibits protected commercial speech and provides no alternative channels of communication. Moreover, commercial speech is not incompatible with the commercial activity in Waikiki. Although this case involves in-person solicitation, which is unlike the situation in *Bloss* where the handbills were affixed to the side of a van, nothing in the record compels us to conclude that the ordinance can be saved from constitutional attack. The rationale of preventing nuisances to preserve the attractiveness of tourism in Waikiki, on balance, is not sufficient to justify the total suppression of commercial speech. *State v. Bloss, supra.* The record does not indicate that the instant handbill was deceptive, false or misleading. Furthermore, the State has not shown that a more limited regulation could not adequately protect the asserted governmental interest. *Id.*

The State also argues that the instant ordinance is not unduly vague and does not violate the due process clause of the federal and state constitutions. We find no new arguments presented by the State which persuades us to change the conclusion reached in *Bloss* on this precise issue. Thus, we adhere to our analysis and conclusion in *Bloss* that Section 26-6.2(b)(7), R.O.H., as amended by Ordinance No. 4302, is unconstitutionally vague.

We reaffirm our decision in *State v. Bloss, supra,* and declare Section 26-6.2(b)(7), R.O.H., as amended by Ordinance No. 4302, unconstitutional as violating the first amendment and the due process clause of the United States and Hawaii Constitutions.[2]

Affirmed.

---

[2]Since *Bloss* declared Section 26-6.2(b)(7), R.O.H., unconstitutional, the ordinance, as it read prior to the 1974 amendment, was reinstated. The ordinance that is presently in effect reads as follows:

> Notwithstanding and ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services except newspapers of general circulation and by duly authorized concessions in public places in the following areas: . . .

Appendix D

NO. 7440

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1979

STATE OF HAWAII, Plaintiff-Appellant, v.
FLOYD BLOSS, Defendant-Appellee.

CRIMINAL NO. 52666

APPEAL FROM THE ORDER DECLARING REVISED ORDINANCE SECTION 26-6.2(b)(7), AS AMENDED BY ORDINANCES 3609 AND 4302 UNCONSTITUTIONAL ON ITS FACE AND DISMISSING CAUSE WITH PREJUDICE, FILED MAY 10, 1979

FIRST CIRCUIT COURT

HONORABLE FRANK T. TAKAO, JUDGE

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed December 17, 1981, the judgment of the trial court is affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawaii, March 10, 1982.

Appendix E

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1981

STATE OF HAWAII, Plaintiff-Appellant, v.
TRACEY L. HAWKINS, Defendant-Appellee.

CRIMINAL NO. 55032

APPEAL FROM THE DECISION, FILED FEBRUARY 23, 1981

FIRST CIRCUIT COURT

HONORABLE RICHARD Y. C. AU, JUDGE

JUDGEMENT ON APPEAL

Pursuant to the Per Curiam Opinion of the Supreme Court of the State of Hawaii filed on April 20, 1982, the decision of the lower court is affirmed.

Dated at Honolulu, Hawaii: April 30, 1982.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1982, two (2) copies of the Petition for Writ of Certiorari were delivered to:

(1) JAMES T. WADA, Esq.

Suite 856
1314 South King Street
Honolulu, HI 96814
Tel. No.: 524-6399

(2) EVAN SHIRLEY Esq.

Suite 606
333 Queen Street
Honolulu, HI 96813
Tel. No.: 524-1396

I further certify that all parties required to be served have been served.

ARTHUR E. ROSS
Office of the Prosecuting Attorney
1164 Bishop Street
Honolulu, HI 96813

Counsel for Petitioner

Opposition

Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2067

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF HAWAII,
Petitioner,
vs.
FLOYD BLOSS,
Respondent.

STATE OF HAWAII,
Petitioner,
vs.
TRACEY L. HAWKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

RESPONDENT'S BRIEF IN OPPOSITION

EVAN R. SHIRLEY
524 Cooke Street
Honolulu, Hawaii 96813
Telephone: (808) 536-0831

Attorney for Respondent
Floyd Bloss

TABLE OF CONTENTS

RESPONDENT'S BRIEF IN OPPOSITION..... 2

REASONS WHY THE WRIT SHOULD BE DENIED

1. The judgment of the Supreme Court of the State of Hawaii rests upon adequate and independent state grounds..... 2

2. The Hawaii court fully considered and correctly decided the issues..... 12

3. Even if "commercial handbilling" on public property is not constitutionally protected, the vagueness of the ordinance vitiates its effectiveness..... 15

CONCLUSION..... 17

TABLE OF AUTHORITIES CITED

CASES

Bigelow v. Virginia, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975).. 14

California v. Krivda, 409 U.S. 33, 34 L.Ed.2d 45, 93 S.Ct. 32 (1972)..... 4,6

Cammarano v. United States, 358 U.S. 498, 514, 3 L.Ed.2d 462, 79 S.Ct. 524 (1959)..... 14

Delaware v. Prouse, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979).. 7,8

Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973) 9

Lynch v. New York, 293 U.S. 52, 79 L.Ed 191, 55 S.Ct. 16 (1934)..... 4,12

Metromedia Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 80 (1981)..... 14

People v. Krivda, 5 Cal.3d 357, 366-367, 486 P.2d 1262, 1268, 96 Cal.Rptr. 62 (1971)..... 5

Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 37 L.Ed.2d 669, 93 S.Ct. 2553 (1973)..... 14

State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977)..... 9

State v. Bumanglag, 63 Haw. __, 634 P.2d 80 at 92 (1981)..... 10,11

State v. Furuyama, 64 Haw. ____, 637 P.2d 1095 at 1104 (1981)..... 10,11

State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974)..... 7

State v. Manzo, 58 Haw. 440, 445, 573 P.2d 945, 949 (1977)..... 16

State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978)..... 8

State v. Rosborough, 62 Haw. 238, 615 P.2d 84 (1980)..... 9

United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973)..... 9

Valentine v. Chrestensen, 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942). 13,14

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976)..... 13

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977)..... 7

CONSTITUTION

United States Constitution
First Amendment..... 3,9, 13,16

Fourth Amendment..... 5,8, 9

Fourteenth Amendment..... 3,8, 16

California Constitution
Article I, Section 19..... 5

Delaware Constitution
Article I, Section 6..... 8

Hawaii Constitution
Article I, Section 4..... 3,9, 10,16

Article I, Section 5..... 3,15, 16

Article I, Section 7..... 8,9, 10

ORDINANCE

Revised Ordinance of Honolulu
Section 26-6.2(b)(7)..... 2,3

NO. 81-2067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF HAWAII,

Petitioner,

vs.

FLOYD BLOSS,

Respondent.

STATE OF HAWAII,

Petitioner,

vs.

TRACY L. HAWKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF HAWAII

RESPONDENT'S BRIEF IN OPPOSITION

The respondent FLOYD BLOSS respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of the State of Hawaii in this case because this Court lacks jurisdiction to decide issues based upon state constitutional grounds and the Hawaii court decision was based upon sound constitutional principles. The opinion of the Hawaii Supreme Court is reported at 637 P.2d 1117.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The judgment of the Supreme Court of the State of Hawaii rests upon adequate and independent state grounds.

The basis for the Hawaii Supreme Court finding Section 26-6.2(b)(7), Revised Ordinances of Honolulu, to be unconstitutional is articulated as follows:

> Therefore, we hold that Section 26-6.2(b)(7), R.O.H., impermissibly regulates protected commercial speech which violates the First Amendment of the United States Constitution, and Article I, Section [4] of the Hawaii State Constitution. [p. A-21]

The Hawaii Supreme Court concludes the opinion with the following language:

> Based on our discussions, we find that Section 26-6.2(b)(7), R.O.H., is an impermissible regulation of protected commercial speech. The instant ordinance abridges rights protected by the First Amendment of the United States Constitution, and Article I, Section [4] of the Hawaii State Constitution.
>
> We also find that Section 26-6.2(b)(7), R.O.H., is vague and ambiguous. Thus, the ordinance violates the due process clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section [5] of the

Hawaii State Constitution. [A-27]

By virtue of the conjunction "and" being utilized, the Hawaii court rested its decision on both state and federal grounds, either of which would have been dispositive. The Court accordingly has no jurisdiction to reverse the Hawaii court. Lynch v. New York, 293 U.S. 52, 79 L.Ed 191, 55 S.Ct. 16 (1934).

The state constitutional grounds are sufficient in and of themselves to sustain the decision of the Hawaii court. When the Hawaii Supreme Court determines that a municipal ordinance enacted in Honolulu, Hawaii unconstitutionally restrains free expression in the State of Hawaii as guaranteed by the Hawaii State Constitution, federal courts cannot and should not dictate to the Hawaii court the interpretation to be placed on provisions of the Hawaii State

Constitution relative to free expression in the State of Hawaii.

This Court in California v. Krivda, 409 U.S. 33, 34 L.Ed.2d 45, 93 S.Ct. 32 (1972) vacated the decision of the Supreme Court of California because the Court was unable to determine whether the California court had based its holding upon the Fourth Amendment to the federal constitution or upon the equivalent provision (Article I, Section 19) of the California Constitution, or both. The California court decision failed to specifically mention either provision of the respective constitutions but merely stated that "we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant." People v. Krivda, 5 Cal.3d 357, 366-367, 486 P.2d 1262, 1268, 96

Cal.Rptr. 62 (1971).

Upon remand to the Supreme Court of California in bank, the court certified that it "relied upon both the Fourth Amendment to the United States Constitution and Article I, Section 19, of the California Constitution". People v. Krivda, 8 Cal.3d 623, 504 P.2d 457 at 457, 105 Cal.Rptr. 521 (1973). The former decision was reiterated and otherwise not altered or amended. The California court accordingly found that the California Constitution furnished an independent ground to support the result the California court reached in the prior opinion. This subsequent decision of the California court was again reviewed on a petition for certiorari by this Court and the petition denied. California v. Krivda, 412 U.S. 919, 37 L.Ed.2d 145, 93 S.Ct. 2734 (1973).

The Hawaii Supreme Court in its

decision now being challenged followed the precise pattern of language utilized by the California court on remand. To conclude that Hawaii court's reference to the Hawaii State Constitution was mere "lip service" (p.9) is a denigration to the Supreme Court of the State of Hawaii and the Hawaii State Constitution.

The Hawaii Supreme Court is and has for some time been conscious that it is the final arbitrator of the Constitution of the State of Hawaii and the Hawaii court has not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions of the Federal Bill of Rights. State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974).

Moreover, the instant decision is not one of those cases where the Hawaii court felt compelled by what it

understood to be federal constitutional considerations to construe its own law in the manner it did. cf., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977); Delaware v. Prouse, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979).

Both Zacchini and Delaware v. Prouse are readily distinguished from the opinion of the Hawaii court. The opinion by the Ohio court in Zacchini did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. 433 U.S. at 568. The framing of the issue and express holding of the Delaware court in Delaware v. Prouse specifically excluded consideration of Delaware

Constitution Article I, Section 6,[1] the equivalent provision to the Fourth Amendment, while expressly relying upon the Fourth and Fourteenth Amendments.

In contrast, the Supreme Court of Hawaii has historically provided greater protections of individual rights based upon Article I, Section 4 and Article I, Section 7 of the Constitution of the State of Hawaii than have been provided

---

[1]"The precise legal issue raised in this appeal is whether the stop of defendant's automobile was an unconstitutional seizure within the meaning of the Fourth and Fourteenth Amendments." State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978). "We hold, therefore, that a random stop . . . is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution." State v. Prouse, 382 A.2d 1359, 1364 (Del. 1978).

by the First and Fourth Amendments to the United States Constitution.[2]

---

[2]These provisions are really the textual equivalents of the First and Fourth Amendments.

Section 4. No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Section 7. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communication sought to be intercepted.

For example, the Hawaii Supreme Court has in certain areas of search and seizure law determined that the Hawaii Constitution is more protective of individual rights than the minimum standards governed by the federal constitution. State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977); State v. Rosborough, 62 Haw. 238, 615 P.2d 84 (1980); cf. Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973) and United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973).

The Hawaii court has also extended rights based upon first amendment considerations beyond the minimum requirements of the federal constitution premised upon the court's interpretation of Article I, Section 4 and Section 7 of the Hawaii Constitution. In State v. Bumanglag, 63 Haw. __, 634 P.2d 80 at 92

(1981), the Hawaii court ordered suppression of motion picture films despite the refusal of federal courts to do so. In State v. Furuyama, 64 Haw. __, 637 P.2d 1095 at 1104 (1981) the Hawaii Supreme Court held that a police officer may not, absent exigent circumstances, effect a warrantless arrest in a setting where first amendment freedoms are implicated. Furuyama, supra, like Bumanglag, supra, extends beyond the existing federal constitutional requirements.

Of considerable importance in both the Bumanglag and Furuyama cases is the language utilized by the Hawaii court upon which the decision was based. Both opinions were expressly based upon state and federal constitutional grounds using the conjunctive "and" or "as well as" to express the court's intent.

The intent of the Hawaii court in

utilizing the conjunctive "and" in the instant case cannot be seriously questioned. The use of "and" means that both federal and state constitutional provisions each provide independent and sufficient grounds (either of which would be dispositive) to support the result. Where the judgment of a state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, the Supreme Court will not take jurisdiction. Lynch v. New York, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934). The Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii must accordingly be denied.

2. The Hawaii court fully considered and correctly decided the issues.

The petitioner has attempted to focus on the fact that a "commercial handbill" was utilized in the charge made against Floyd Bloss. Apparently because a "commercial handbill" was also involved in Valentine v. Chrestensen, 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942), the petitioner believes that Valentine provides the authority on which this court is to review the decision of the Hawaii Supreme Court.

To the extent that Valentine v. Chrestensen held that commercial speech was outside the protection of the First Amendment, such holding was expressly repudiated in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976).

> Our question is whether speech which does "no more than propose a commercial transaction" . . . is so removed from any "exposition of ideas" . . . that it lacks all protection. Our answer is that it is not. 425 U.S. at 762.

Contrary to the assertions of Petitioner that "the continued vitality of Valentine, supra, was confirmed in Bigelow v. Virginia", 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975) (p. 8), Valentine does not continue to have constitutional validity. Indeed, twenty three years ago this Court noted that the Valentine decision was casual, almost offhand. And it has not survived reflection." Cammarano v. United States, 358 U.S. 498, 514, 3 L.Ed.2d 462, 79 S.Ct. 524 (1959). Any notion that the 'commercial speech' distinction announced in Valentine retains continuing validity was extinguished by the series of cases beginning with Pittsburgh Press Co. v. Human Relations

Comm'n, 413 U.S. 376, 37 L.Ed.2d 669, 93 S.Ct. 2553 (1973) and continuing through Metromedia Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

Valentine v. Chrestensen, supra, does not provide the authority on which to reverse the decision of the Hawaii Supreme Court and to the extent petitioner so urges, petitioner's argument is without merit.

3. **Even if "commercial handbilling" on public property is not constitutionally protected, the vagueness of the ordinance vitiates its effectiveness.**

The Hawaii court did not limit its vagueness evaluation solely to the handbilling portion of the ordinance. The Hawaii court determined that the

ordinance was unconstitutionally vague by the language in the ordinance which makes it criminal to "solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly" and "to carry on or conduct any commercial promotional scheme, advertising program or similar activity." [A-24 n. 15] The Hawaii court determined that the ordinance thereby violated Article I, Section 5 of the Hawaii State Constitution[3] as well as the Fourteenth Amendment.

The Hawaii court found that the ordinance is broad enough in its terms to suppress protected speech, without

---

[3]Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

the need of showing that the specific conduct before the court was protected and therefore, the ordinance is facially invalid. State v. Manzo, 58 Haw. 440, 445, 573 P.2d 945, 949 (1977).[4]

It is not contested by petitioner that the above language has not been defined by any court or statute. The finding of the Hawaii court that the ordinance does not pass constitutional muster thus remains uncontested and, accordingly, the decision, even if supported on this ground alone, must not be disturbed.

CONCLUSION

For these reasons, the petition for

---

[4]The decision in State v. Manzo was likewise ruled upon in light of both Article I, Section 4 and 5 of the Hawaii State Constitution and the First and Fourteenth Amendments.

a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, July 9, 1982.

Respectfully submitted,

EVAN R. SHIRLEY
524 Cooke Street
Honolulu, Hawaii 96813
Counsel for Respondent
Floyd Bloss